

THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

DOCKET NO. 2019-185-E

DOCKET NO. 2019-186-E

In the Matter of:)	
)	
South Carolina Energy Freedom Act)	DUKE ENERGY CAROLINAS,
(H.3659) Proceeding to Establish Duke)	LLC AND DUKE ENERGY
Energy Carolinas, LLC's and Duke Energy)	PROGRESS, LLC'S RESPONSE
Progress LLC's Standard Offer Avoided)	TO ORDER NO. 2019-126-H
Cost Methodologies, Form Contract Power)	
Purchase Agreements, Commitment to Sell)	
Forms, and Any Other Terms or Conditions)	
Necessary (Includes Small Power)	
Producers as Defined in 16 United States)	
Code 796, as Amended) – S.C. Code Ann.)	
Section 58-41-20(A))	

NOW COME Duke Energy Carolinas, LLC (“DEC”) and Duke Energy Progress, LLC (“DEP” and, together with DEC, the “Companies” or “Duke”), by and through counsel, and hereby respond to Order No. 2019-126-H, issued in the above captioned-proceedings on October 24, 2019 (“Order Requesting Comments”). As described in the Order Requesting Comments, Intervenor South Carolina Solar Business Alliance, Inc. and Johnson Development Associates, Inc. (together “SBA/JDA”) have proposed via email to the Hearing Officer on October 23, 2019, to make a post-hearing submission of a proposed alternative power purchase agreement (“PPA”) for a contractual term longer than 10 years under authority provided by S.C. Code Ann. § 58-41-20(F)(1).¹ This section of Act 62 provides:

(F)(1): Electrical utilities, subject to approval of the commission, shall offer to enter into fixed price power purchase agreements with small power producers for the purchase of energy and capacity at avoided cost, with commercially reasonable terms and a duration of

¹ SBA/JDA’s email also requested similar authorization in Docket No. 2019-184-E. However, the Companies are not parties to that proceeding.

ten years. **The commission may also approve commercially reasonable fixed price power purchase agreements with a duration longer than ten years, which must contain additional terms, conditions, and/or rate structures as proposed by intervening parties and approved by the commission, including but not limited to, a reduction in the contract price relative to the ten year avoided cost. Notwithstanding any other language to the contrary, the commission will make such a determination in proceedings conducted pursuant to Section 58-41-20(A).** The avoided cost rates applicable to fixed price power purchase agreements entered into pursuant to this item shall be based on the avoided cost rates and methodologies as determined by the commission pursuant to this section. The terms of this subsection apply only to those small power producers whose qualifying small power production facilities have active interconnection requests on file with the electrical utility prior to the effective date of this act. The commission may determine any other necessary terms and conditions deemed to be in the best interest of the ratepayers. This item is not intended, and shall not be construed, to abrogate small power producers' rights under PURPA that existed prior to the effective date of the act. (emphasis added).

If the Commission allows SBA/JDA to put forward an alternative PPA proposal under Section (F)(1), SBA/JDA also propose a schedule for intervenors to initially file a PPA and for Duke to respond to the PPA proposal(s) made by intervenors. SBA/JDA recommend that intervenors would file their PPA proposal by October 31, 2019, and that Duke and other intervenors should then be allowed to respond by November 6, 2019.

For the reasons further set forth in this Response, Duke objects to SBA/JDA's procedural request to introduce new evidence in the form of an alternative PPA after the hearing has concluded in these proceedings. Duke also highlights for the Commission that denying SBA/JDA's requested relief will not foreclose SBA's members nor JDA from entering into a PPA for a term longer than 10 years under the Companies' Competitive Procurement of Renewable Energy ("CPRE") Program.

In support of this Response, the Companies' state as follows:

I. No intervening party proposed PPAs with terms longer than 10 years pursuant to S.C. Code Ann. § 58-41-20(F)(1) in this proceeding in pre-filed testimony or prior to the conclusion of the evidentiary hearing.

Subsection (F)(1) provides that the Commission can, under certain circumstances, approve a PPA with terms longer than 10 years. This section places a burden on intervening parties to propose PPAs longer than 10 years, and those proposed PPAs “must contain additional terms, conditions and/or rates structures” No party made such proposal in pre-filed direct testimony filed on September 11, 2019, nor through surrebuttal testimony filed October 11, 2019. While JDA Witness Rebecca Chilton’s pre-filed direct testimony recommends that the Commission establish 15-year PPAs, she recognizes in her pre-filed direct testimony that any PPA of such contract length must include the “appropriate conditions as set forth in SC Code Ann. § 58-41-20(F)(1).”² This testimony does not in any way constitute a proposal containing additional terms, conditions and/or rates structures, as required for PPAs longer than 10 years by Section 58-41-20(F)(1). Indeed, Ms. Chilton acknowledged this deficiency in her pre-filed surrebuttal testimony, noting “[i]t is explicit in Act 62 that prior to a utility executing interconnection agreements and PPAs with QFs located in South Carolina with an aggregate nameplate capacity equal to twenty percent of the previous five-year average of the utility's South Carolina retail peak load that fixed price contracts longer than 10 years include a decrement to the 10-year avoided cost rate be applied to the portion of the contract extending beyond ten years **and as proposed by the intervenors. As such, JDA expressly preserves the right in this docket, future proceedings, and in PPA negotiations to propose various methods of complying with the Act 62 requirements for longer term contracts. I leave open the possibility to offer testimony as necessary.**”³ (emphasis added). JDA never made the proposal that witness Chilton reserved for the future.

² JDA Witness Chilton Direct Testimony, at 9.

³ JDA Witness Chilton Rebuttal Testimony, at 5.

II. SBA/JDA's procedural request to introduce new evidence in the form of an alternative PPA after the hearing has concluded violates Act 62, the South Carolina Administrative Procedures Act, and the South Carolina Constitution.

JDA and SBA have not explained why they elected not to avail themselves of the right to timely present a form of PPA for a term longer than 10 years prior to the evidentiary hearing in this proceeding. However, S.C. Code Ann. § 58-41-20(F)(1) makes clear that Commission consideration of the optional PPA cannot be considered in the instant proceedings. Section 58-41-20(F)(1) of Act 62 also provides that “[n]otwithstanding any other language to the contrary, the commission will make such a determination in proceedings conducted pursuant to subsection (A).” Subsection (A)(2) of 58-41-20 provides that “[p]roceedings conducted pursuant to this section shall include an opportunity for intervention, discovery, filed comments or testimony, and an evidentiary hearing.” For any PPA (or terms and conditions to be included in a PPA) proposed by JDA or SBA after the conclusion of the evidentiary hearing, no opportunity for “intervention, discovery, testimony and an evidentiary hearing” would exist. Accordingly, no such proposal submitted after the evidentiary hearing has concluded can be properly considered in these dockets under the very wording of Act 62.

In addition to conflicting with the express provisions of Act 62, the proposal by JDA and SBA to have a new PPA approved by the Commission in these dockets conflicts with the fundamental due process provisions of the South Carolina Administrative Procedures Act (“APA”) and Article I, Section 22 of the South Carolina Constitution. Because a proposal made pursuant to S.C. Code Ann. § 58-41-20(F)(1) must be approved by the Commission after an opportunity for a hearing, any proceeding to approve such a proposal is a “contested case” as that term is defined in the APA at S.C. Code Ann. §1-23-310(3). For contested cases the notice and hearing provisions of the APA contained in S.C. Code Ann. §1-23-320 apply. The requirements of Section 1-23-320

include notice of not less than 30 days, an opportunity to conduct discovery, and an opportunity to present evidence and argument on the issues raised by the proposed new PPA. For the PPA that JDA and SBA propose to submit, none of these requirements of the APA can be met.

The proposal by JDA and SBA also asks this Commission to approve a PPA in violation of the requirements of Article 1, Section 22 of the South Carolina Constitution.

SECTION 22. Procedure before administrative agencies; judicial review. No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

The South Carolina Supreme Court has held that this provision applies the fundamental requirements of due process to administrative proceedings including “notice, an opportunity to be heard in a meaningful way and judicial review.” *Kurschner v. City of Camden Planning Commission*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). For any proposal made by JDA and SBA after the conclusion of the evidentiary hearing, these fundamental requirements cannot be met.

Moreover, as required by Act 62, DEP and DEC has submitted to the Commission their forms of Large QF PPAs, which have been amended and re-filed in pre-filed rebuttal testimony, to respond to issues raised by ORS Witness Brian Horii and SBA Witness Steven Levitas. These PPAs are supported in the pre-filed direct and rebuttal testimony of Duke Witness David Johnson, the pre-filed direct and surrebuttal testimony ORS Witness Brian Horii, and are addressed in the pre-filed direct and surrebuttal testimony of SBA Witness Steven Levitas. These proposals have been properly submitted to the Commission pursuant to the provisions of S.C. Code Ann. § 58-41-

20(A) and they are the only PPAs that are properly before the Commission for consideration in this docket.

III. SBA/JDA continue to have options to pursue a PPA longer than 10 years prior to the Commission's next avoided cost proceeding under Act 62.

While SBA/JDA's unexplained failure to timely present their proposed alternative PPA, as required by Act 62, has foreclosed Commission approval of such a proposal in this proceeding, SBA/JDA still have options to enter into PPAs for a term longer than ten years with DEC and DEP. As explained by Duke Witness George Brown, the now-open Tranche 2 of the Competitive Procurement of Renewable Energy Program solicitation process provides QFs a PPA option for 20 years if the QF is the most cost-effective option for customers. SBA's members and JDA are certainly free to compete in that process. Moreover, to the extent a QF seeks to negotiate a PPA with differing terms outside of this proceeding, S.C. Code Ann. § 58-41-20(A) provides electrical utilities and small power producers that right to enter into PPAs with terms that differ from the commission approved form(s); however, those terms cannot be dictated as just and reasonable and mandatory for all QFs in this proceeding. JDA and SBA members are free to bring their proposals as part of those PPA negotiations, and they may also timely bring forward proposals that meet the subsection (F)(1) requirements in future avoided costs/ PURPA implementation proceedings.

IV. Conclusion

In sum, the proposal put forward by SBA/JDA violates Act 62, the APA, and the South Carolina Constitution, and the Commission cannot lawfully consider such new proposals in the instant proceeding. To the extent that individual QFs desire a PPA with a contract term longer than 10 years, options exist through the CPRE Program and through potential PPA negotiations prior to the Commission's next review of Duke's avoided cost rates.

WHEREFORE, for all of the foregoing reasons, DEC and DEP respectfully request that the Commission deny SBA/JDA's request.

Respectfully submitted, this the 28th day of October, 2019.

s/Frank R. Ellerbe, III

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